TNG TIEN CHAI & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ABDUL KADIR BIN MUSA JC
[CRIMINAL RETRIAL NOS. 42-85-93 & 42-86-93]
30 JANUARY 1995

EVIDENCE: *Parole evidence rule - Evidence to contradict the police report - Whether precluded by ss. 91 & 92 Evidence Act 1950 - Section 107 Criminal Procedure Code.*

EVIDENCE*: Charge of rape - Consent to sexual intercourse - Whether alleged rape corroborated in material particulars - Whether ingredients proven beyond reasonable doubt.*

The appellants were charged for rape, convicted by the Sessions Court and were each sentenced to five (5) year's inprisonment. They appealed to the High Court against conviction and sentence and the Public Prosecutor filed a cross-appeal. The 1st appellant's and the Public Prosecutor's appeal and cross-appeal respectively were dismissed and the 2nd appellant's appeal was allowed. Thereafter, the 1st appellant appealed and the Public Prosecutor cross-appealed against the learned High Court Judge's decision pursuant to s. 50 of the Court of Judicature Act 1964 from which the present re-hearing was ordered. The issues that arose were as follows:

(i) reliability of material witnesses

(ii) need for corroboration

(iii) whether parole evidence can be admitted to contradict the complainant's police report in view of ss. 91 & 92 Evidence Act 1950. The complainant had used the words "totally unconscious" in the report and the appellant argued that she could not thereby give a detailed account of the alleged crime or the identity of the person involved.

Held:

[1] There was no strenuous challenge to the credibility of all material prosecution witnesses in respect of the essential ingredients of the charge. It was not disputed that there was sexual intercourse between the complainant and the appellant on the date and place stated in the charge.

[2] On the issue of consent, it was beyond reasonable doubt that the complainant did not consent to the intercourse and that was not rebutted by the appellant. On the facts, there was abundant corroboration of the rape in material particulars.

[3] The word "document" in s. 91 must necessarily mean any document relating to terms of contracts, grants and other disposition of property. A police report is not within the intended ambit of s. 91.

[4] The police report was not substantive evidence but could corroborate or contradict the informant's evidence in Court. The complainant's testimony in the Court below should not be treated as parole evidence but a detailed account of what she failed to put in the report. The words "totally unconscious" was only a rough description of her physical and mental state at the time.

[1st appellant's appeal and prosecution's cross-appeal dismissed]

Cases referred to:
Khoo Hin Chan v. PP [1994] 1 MLJ 265 ***(refd)***
Ah Mee v. PP [1967] 1 MLJ 221 ***(dist)***
PP v. Fong Chee Cheong [1970] 1 MLJ 97 ***(refd)***
PP v. Datuk Haji Harun b. Haji Idris & Ors. [1977] 1 MLJ 180, [1978] 1 MLJ 240 FC ***(foll)***
Apren Joseph alias Current Kunjukunju & Ors. v. The State of Kerala, AIR [1973] SCI (Vol. 60 C1) ***(refd)***
Thulia Kali v. The State of Tamil Nadu, AIR [1973] SC 501 (Vol. 60 C 101)) ***(cit)***
Herchun Singh & Ors. v. PP [1969] 2 MLJ 209, 211 ***(foll)***

Legislation referred to:
Court of Judicature Act 1964, s. 50
Criminal Procedure Code, s. 107(1) & (2)
Criminal Procedure Code (India), s. 154
Evidence Act 1950, ss. 91 & 92

Other source referred to:
Sohoni's Commentary on s. 154 of the Indian Criminal Procedure Code, 16th Edn., Vol. 1, p. 750

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the public prosecutor - Kamaruzaman bin Abd. Jalil, DPP

JUDGMENT

Abdul Kadir bin Musa JC:

Both the appellant-respondents were charged for and tried by the Kuala Lumpur Sessions Court as follows:

(i) Against first appellant:

Respondent (Tng Tien Chai)

Bahawa kamu pada 2 Mac 1993 antara jam 7.00 p.m. hingga 8.30 p.m., di rumah No. 16, Jln. 4/140, Taman Naga Emas, Salak South dalam daerah Cheras, dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan, telah melakukan rogol terhadap Wong Mei Wan dan oleh yang demikian, kamu telah melakukan satu kesalahan dan boleh dihukum di bawah Seksyen 376 Kanun Keseksaan; and

(ii) Against second appellant:

Respondent (Soh Teck Leong)

Bahawa kamu pada (tarikh, masa dan tempat yang sama di atas), telah menyubahati Tng Tien Chai melakukan rogol terhadap Wong Mei Wan yang mana perbuatan itu dilakukan akibat daripada persubahatan kamu itu dan oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 109 Kanun Keseksaan dan seksyen 376 (yang sama).

At the end of the full trial (16 September 1993) both of them were found guilty of the charge preferred against each of them. Due to their respective ages being below 21 years, the sentence was deferred to 21 October 1993 to enable the Court to receive and consider their respective probation reports (P28 and P29 respectively; please see pp. 158-163 of the record of appeal). On that date and after considering P28 and P29, the learned Judge of Sessions Court passed a sentence of 5 years imprisonment against each of them. Her reasons for doing so were clearly elucidated in her grounds of judgment at pp. 136 and 137 of the record.

On 22 October 1993 both the appellant-respondents filed their notice of appeal against the whole decision of the learned Sessions Court Judge, and on 29 October 1993, the learned Public Prosecutor filed in their notice of cross-appeal against the aforesaid sentence. All the said appeals came to be heard before me on 31 December 1994.

After hearing the submissions from both sides and careful consideration of the record of appeal, I dismissed both the appeal and cross-appeal by the first appellant-respondent (hereinafter referred to as "the appellant") and by the Public Prosecutor respectively and upheld the whole decision of the Court below. In respect of the second appellant-respondent, I allowed his appeal and set-aside the decision of the learned Sessions Court Judge and consequential to that, I dismissed the cross-appeal accordingly. The appellant now appealed against my said decision by virtue of s. 50 Court of Judicature Act 1964. Since there was no appeal against my aforesaid decision in respect of the second appellant-respondent, I have therefore only to consider matters relating to the appellant in this decision of mine.

If I may be permitted at this juncture to point out that the facts of the case were clearly laid down by the learned Judge of Sessions Court at **pp. 123 to 129 of the record**. Those facts were not really disputed by either Mr. Karpal Singh nor the learned Deputy Public Prosecutor (En. Kamaruzaman b. Abd. Jalil). As such and with permission, I do not propose to repeat them here. I further agreed with Mr. Karpal Singh that in cases of this nature, the two most important tests to be thoroughly considered by the trial Court are:

(i) the reliability of all the material witnesses; and

(ii) the need for corroboration.

Thus it goes with logic that the need for corroboration will only surface for due deliberation and consideration after the "reliability test" has been firmly established by the prosecution and satisfied by the Court beyond any reasonable doubt within the principles laid down in *Khoo Hin Chan v. PP* [1994] 1 MLJ 265.

After close scrutiny of the record and detail analysis of Mr. Karpal Singh's submission before me, it became transparent to me that he did not, in actual fact, strenously challenge the credibility of all material prosecution witnesses in respect of the essential ingredients of the charge that are required to be proved by the prosecution. For example, he did not dispute the fact that Sam Lim Yen Lim (SP2), Hardeep Singh (SP3) and Raymond Sun Kwong Ngun (SP4) who were all course-mates of Wong Mee Wan (SP16), the complainant in this case, one way or another positively knew and told the Court that the appellant was actually seen with SP16 on 2 March 1993 at about 3.00 p.m. entering into a car parked at Metro Jaya car park. Then SP16 was not normal and told to SP3 that she was not feeling well. The evidence of the chemist, Encik Moktar b. Mohd (SP14) as to the effect of Dhasedyl, a cough mixture, on SP16 was also not challenged. In short, it was not in dispute that there was conclusive evidence that there was sexual intercourse between the appellant and SP16 on the material date, place and time as stated in the charge. The question is that, "was there any **consent by SP16** to have sexual intercourse with the appellant on the material date?"

Evaluating extensively from the record, including the reasons put forward by the learned Sessions Court Judge, I was fully satisfied beyond any reasonable doubt that under the condition as stated by SP14, SP16 did not and could not have given the necessary consent to the said sexual intercourse on her by the appellant. This fact could not be rebutted by the appellant at all.

In coming to the above conclusion, I was also satisfied that there was abundant corroboration in material particulars as to the alleged rape by the appellant on SP16. This too was not strenuously challenged by Mr. Karpal Singh. Any submission by him to the contrary has **not** been able to create or raise any reasonable doubt, on the balance of probabilities, to the prosecution case in this respect.

What was interesting and required to be looked into in greater detail by me was Mr. Karpal Singh's submission on the effect of ss. 91 and 92 of the Evidence Act 1950 in relation to police report (P26) at p. 155 of the record and that of the detailed account of the sexual intercourse given by SP16.

After pointing out to Mr. Karpal Singh that I was satisfied that the appellant did commit rape as alleged by the prosecution, subject to his observation and submission as to the effect of the aforesaid two sections, he agreed with me that:

(i) his case pivoted mainly on my ruling on the effect of those two said sections; and

(ii) that being the point of law, the Court may consider giving time to the learned Deputy Public Prosecutor to look into the matter.

As to **(i) above**, he agreed that if I held against him, then his client stands guilty of the charge levelled against him, but not otherwise. This stand was agreed to by the learned Deputy Public Prosecutor. In respect of **(ii) above**, I adjourned the appeal to 20 January 1995 for the learned Deputy Public Prosecutor to reply.

According to Mr. Karpal Singh, by the chemistry of ss. 91 and 92 **no** parole evidence can be received and admitted in evidence to contradict what was put in writing by SP16 in the form of police report (P26). He relied his contention on the Federal Court case of *Ah Mee v. PP* [1967] 1 MLJ 221, *per curiam*, which states as follows:

> Section 91 of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically states that 'in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms ... of such matter except the document itself.' The report was information relating to the commission of an offence which 'shall be reduced to writing' pursuant to s. 107 of the Criminal Procedure Code (Cap 6), and s. 92 of the Evidence Ordinance goes on to exclude all parole evidence seeking to contradict or vary what was set out in writing.

Section 107 of the Criminal Procedure Code provides:

> (1) Every information relating to the commission of an offence ... shall be reduced to writing ...
>
> (2) Every such information shall be entered in a book to be kept by such officer ... on which such information was given, ...

It was not disputed by both parties that P26 was written by SP16 herself and that it falls well within the ambit of s. 107 of the Criminal Procedure Code. As such, it was contended by Mr. Karpal Singh that by virtue of s. 91 of the Evidence Act 1950, P26 must therefore be subjected to s. 92 of the Act which disallowed the prosecution to admit any parole evidence which has the effect of varying or contradicting P26.

He argued that since the words "totally unconscious" were found in P26, she could not have been able to positively give the detailed account of the relevant sexual intercourse nor the identity of the actual person involved. That being the situation, he contended that his client should have been acquitted by the Court below. That was because s. 92 of the

Evidence Act requires that any oral evidence of SP16 which have the effect of varying or contradicting P26 should therefore be ignored. If that was observed, it was his submission that there was **no** evidence to show that his client had committed the rape as charged, and his appeal should therefore be allowed.

The learned Deputy Public Prosecutor on the other hand submitted that, the words, "totally unconscious" found in P26 should not be construed as a complete accurate account of SP16's physical condition then but instead, having regard to all the circumstances of the case as a whole, to treat them as a mere choice of words by SP16 to explain roughly what was her physical condition and the state of her mind at the material time. That being the situation of SP16 then, her testimony in the Court in this respect was, in actual fact, her truthful detailed account of what actually happen to her on the material date, place and time and **not**, in any way, an attempt by her to contradict or remedy any defect found in P26. In this context, he argued that P26 cannot and should not be treated as substantive evidence as opposed to any written document envisaged by s. 91 of the Evidence Act 1950.

To add weight to his contention, he quoted the case of *PP v. Fong Chee Cheong* [1970] 1 MLJ 97, where Gill J held that:

> However important a document a first information report is, it can never be treated as a piece of substantive evidence ...

On that note, he strongly contended that in the circumstances of this case, s. 91 of the said Act could not have meant to include "**document**" like P26. His contention was based on *PP v. Datuk Haji Harun b. Haji Idris & Ors.* [1977] 1 MLJ 180, where at p. 183((G) and (H) right) Abdoolcader J said:

> ..., in the context of the wording in s. 92 of the Evidence Act, the clause 'any matter required by law to be reduced to the form of a document' would appear to refer to bilateral instruments and dispositive documents only, such as contracts, grants or other disposition of property which the law requires to be reduced into a document, as, for instance, the depositions of witnesses which, though required by law to be reduced to the form of a document, could not come within this section and oral evidence is therefore admissible to contradict such depositions.

His Lordship's decision and reasons were clearly endorsed by the Federal Court in the same case reported in **[1978] 1 MLJ 240 at p. 247, last sentence at (I) left**, where it was stated, "With respect we agree with the trial Judge that they were admissible for the reasons given by him.". It was pointed out by the learned Deputy Public Prosecutor that in *Ah Mee's* case, the question of the identity of the car involved was the main issue but not in this case. He argued that in the present case it was not the question of the identity of the appellant that was in issue, but SP16's failure to describe more clearly and precisely what she meant by the words "totally unconscious" in P26, which can be treated as an omission more than anything else in line with *Datuk Haji Harun's* case above.

After careful consideration and analysis of both the submissions of Mr. Karpal Singh and Encik Kamaruzaman, I was compelled by all the circumstances of this case, to lean and accept the reasons advanced by Abdoolcader J in *Datuk Haji Harun's* case.

With the greatest of respect, it is my humble opinion that the words "**document**" in s. 91 of the Evidence Act found in the clause "..., and in all cases in which any matter is required by law to be reduced to the form of **document**," must necessarily be meant to be "**any document**" relating to the "**terms of contracts, grants and other dispositions of property**" as intended

by the very **title** of s. 91. Police report such as **P26 is certainly not "a document" relating to any "terms of contract, grant or disposition of property"** and thus should not be within the intended ambit of s. 91 of the Act.

Section 107 of the Criminal Procedure Code merely requires an officer receiving information relating to commission of any offence to reduce such information to writing (s. 107(1) CPC) and keep it in a book (s. 107(2) CPC). Section 107(1) CPC speaks specifically of "information relating to the commission of an offence" given either orally to or under the direction of "an officer in charge of a police station" and **not** to any information relating to "any terms of contracts, grants or other disposition of property (s. 91 Evidence Act 1950)" that is "required by law to be reduced to the form of a document (s. 92 Evidence Act 1950)". Thus in the circumstances of the case before me, the interpretation of Abdoolcader J in *Datuk Haji Harun's* case as to the effect of ss. 91 to 92 of the Evidence Act 1950 is more accurate than what the case of *Ah Mee* is intended to be. This is more so since first information under s. 107 CPC should not and cannot be treated as a piece of substantive evidence.

In the case of *Apren Joseph alias Current Kunjukunju & Ors. v. The State of Kerala,* AIR [1973] SCI (Vol. 60 C1), it was stated that:

> The receipt and recording of information report by the police is not a condition precedent to setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. **First information report under s. 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in Court**. But this information when recorded is the basis of the case set up by the informant.
> (Emphasis is mine).

The above quotation is in line with what was stated in *Fong Chee Cheong's* case. Though P26 cannot be treated as substantive evidence, it is without doubt an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence at the trial (please see *Thulia Kali v. The State of Tamil Nadu,* AIR [1973] SC 501 (Vol. 60 C 101)).

Section 154 of the Indian Criminal Procedure Code is identical to that of our s. 107 of the Criminal Procedure Code. In *Herchun Singh & Ors. v. PP* [1969] 2 MLJ 209, 211, the Federal Court not only distinguished *Ah Mee's* case, but also endorsed *Sohoni's Commentary* on s. 154 *of the Indian Criminal Procedure Code* (16th Edn., Vol. 1, p. 750) as to how to treat first information report. Ong Hock Thye CJ (Malaya) said:

> In short, it is wrong to hold up the first information report as a sure touchstone by which the complainant's credit may invariably be impeached. It can only be used for that purpose with discrimination, in much the same way as previous statements by the witness are used, so that irrelevant **errors in detail are not given exaggerated importance, nor omission, objectively considered in the light of surrounding circumstances**.
> (Emphasis is mine).

From the record, it was clear to me that P26 was in actual fact used for the purpose stated in those cases which I have just referred above, and that was, either to corroborate or contradict the evidence of SP16 in respect of the non-disputed sexual intercourse for purposes of determining whether or not the consent by the SP16 was ever given to the appellant to have such a relationship with her. This can clearly be seen from the evidence of Encik Moktar b. Mohd. (SP14) at pp. 53 and 54 of the record.

Under examination-in-chief, SP14 said:

> Ya saya tahu mengenai ubat bernama Dhasedyl; ... kesannya terhadap sesiapa yang meminumnya walaupun dalam dosage yang biasa, peminum ubat itu akan mengalami rasa mengantuk, keletihan dan kadang-kadang boleh terus tertidur. Ada juga seperti rasa pening, lemah dan '**muscle weakness' boleh jadi 'feeling of confusion**', ... **[tetapi] boleh mengingati dengan waras apa yang berlaku kerana ia tidak mengganggu fikiran secara menyeluruh ...**
> (Emphasis is mine).

and under cross-examination, SP14 said:

> Orang yang tertidur apabila terganggu tidurnya ia akan tahu jika orang yang berada disekelilingnya. Dalam keadaan pening tetapi masih aware dengan keadaan sekeliling dan boleh mengenali orang kelilingnya. ... Ya pengambil ubat itu boleh mengetahui apa yang berlaku ke atas dirinya sendiri. ... ubat Dhasedyl ini bukan ubat sakit kepala. Ia adalah sejenis ubat batuk.

With respect, I was fully convinced that, that piece of evidence of SP14 was clearly used to support the prosecution's assertion that SP16 was raped by the appellant as charged, while at the same time frustrated the defence's attempt to contradict the same. As such, I was satisfied beyond any reasonable doubt, that the prosecution has established as of fact, that even though SP16 wrote in P26 that she was "totally unconscious", she could still and was able to give the detailed account of the actual incident of rape as stated by her both in P26 and in the Court below. The words "totally unconscious" at the most, in the circumstances of this case, was a rough description of SP16 as to her state of physical and mental condition at the material time. As the first information report cannot be treated as a substantive piece of evidence, her evidence in the Court below should not be treated as parole evidence to contradict or vary what she had written in P26, but to treat it as her detailed account of what she had failed to put therein based on *Herchun Singh's* case, which, in essence, is in line with *Datuk Haji Harun's* case as decided by Abdoolcader J.

On the premises above, I dismissed the appellant's appeal and upheld the conviction of the Court below.

As for the sentence, and for the reasons given by the learned Judge of Sessions Court at pp. 136 and 137 of the record, I could not find any justifiable reason for me to disturb her sentence. As such, I upheld her sentence and dismissed the learned Public Prosecutor's cross-appeal against the said sentence.